

**Mining Specialists, Inc. and its alter ego or successor  
Point Mining, Inc. and United Mine Workers of  
America District 17. Case 9–CA–30680**

November 26, 1999

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN  
AND BRAME

On July 8, 1994, the National Labor Relations Board issued a Decision and Order in this proceeding,<sup>1</sup> in which it found, *inter alia*, that the Respondents violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union and abrogating the collective-bargaining agreement between the Union and Respondent Mining Specialists, Inc. (MSI).<sup>2</sup> The Board ordered the Respondents to, *inter alia*, (a) comply with the terms and conditions of the contract retroactively to January 26, 1993, and prospectively until such time as proper and timely notice of cancellation is given, in the manner set forth in the contract; (b) make whole the unit employees<sup>3</sup> by transmitting the contributions owed to the Union's health and welfare, pension, and other funds pursuant to the terms of the contract; and (c) make whole the unit employees for any wages lost as a result of the Respondents' failure to comply with the terms of the contract. Controversies having arisen over the amounts of contributions owed to the funds and the backpay, expenses and benefits due employees under the Board's Order, the Regional Director for Region 9 issued a compliance specification (the specification) and notice of hearing alleging, in pertinent part, that the Respondents owed certain amounts of: (a) contributions to benefit and pension funds; (b) calendar quarter gross backpay, benefits and funds payments for employees who were not properly recalled from layoffs in accordance with the terms of the contract; and (c) overtime, holiday, vacation, and bonus pay. The Respondents filed an answer to the specification (the answer), admitting in part and denying in part the allegations in the specification, and raising four affirmative defenses.<sup>4</sup>

On January 19, 1999, the General Counsel filed with the Board a Motion for Partial Summary Judgment and to Strike Portions of the Respondents' Answer, including the affirmative defenses, with exhibits attached (the motion) and a memorandum in support of the motion. On January 22, 1999, the Board issued an Order Transferring Proceeding to the Board and a Notice to Show Cause

why the General Counsel's motion should not be granted. On February 5, 1999, the Respondents filed a memorandum in opposition to the motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

**Ruling on Motion for Partial Summary Judgment and to  
Strike Portions of Respondents' Answer**

Section 102.56(b) and (c) of the Board's Rules and Regulations states, in pertinent part:

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegation of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for the disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*—If the respondent files an answer to the specification but fails to deny any allegation in the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegations shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

*A. Contributions to the Pension Trust*

**1. Positions of the parties**

Paragraphs 2(c) and (d) of the specification allege (1) that the backpay period for the Respondents' failure to make contributions to the United Mine Workers of America 1974 Pension Trust (the Pension Trust) is from January 26, 1993, until such time as the Respondents give full effect to the relevant provisions of the contract, and (2) that the specific calculations of the amounts of

<sup>1</sup> 314 NLRB 268.

<sup>2</sup> *I.e.*, the National Bituminous Coal Wage Agreement of 1988 (the contract, or the 1988 Wage Agreement).

<sup>3</sup> The Union is the designated and recognized collective-bargaining representative of the Respondents' employees constituting a unit described in the contract between the Union and the Respondents which was entered into in 1988. 314 NLRB at 273 (Conclusion of Law 3).

<sup>4</sup> The Respondents subsequently withdrew Affirmative Defense Three.

the contributions owed through April 4, 1998<sup>5</sup> are set forth in appendix A of the specification. In their answer, the Respondents deny that any amounts are due and owing under the Pension Trust. Alternatively, the Respondents assert that if such amounts are due and owing, the Respondents are not liable for the amounts set forth in appendix A of the specification, but rather are liable for the amounts set forth in appendix 1 of their answer.

The General Counsel argues that the Respondents' answers to paragraphs 2(c) and (d) constitute merely a general denial, which fails to comport with the requirement of specificity and particularized pleadings within the meaning of Section 102.56 of the Board's Rules and Regulations. In opposition to the motion, the Respondents first raise their Affirmative Defense One, i.e., that the Respondents are not liable for any backpay or contributions "because the individuals allegedly due were not members" of the Union, and therefore, under the terms of the contract, they were not entitled to the benefit of that contract. More specifically, the Respondents assert that article I of the contract obligates all employees covered by the contract "to be or become members of the [Union]."<sup>6</sup> The Respondents assert that at the hearing in this case, they will offer evidence that most, if not all, of the individuals allegedly due backpay or relief under the contract have not paid required dues to the Union, and that, having failed to meet their obligations under the contract, they are not entitled to the benefits of it.<sup>7</sup> The General Counsel argues that this affirmative defense flies in the face of elementary Board law that bargaining unit employees who choose to refrain from becoming union members are entitled to the same benefits as are dues-paying members.

In the alternative, the Respondents concede that if Affirmative Defense One is found to be without merit, they are liable for contributions to the Pension Trust. In that event, the Respondents contend that under the collective-bargaining agreement, the specification should have calculated the amounts due based on "hours worked," not "hours paid." In support of their alternative position, the Respondents have supplemented the amounts set forth in appendix 1 to their answer with assertedly more specific

calculations which are based on hours worked and which are contained in exhibit 2 to their memorandum in opposition to the motion.

## 2. Analysis and conclusions

We agree with the General Counsel that the Respondents' Affirmative Defense One should be rejected. The union-security provisions of Section 8(a)(3) of the Act provide, *inter alia*, that employees may be required, as a condition of their employment, to become and remain union members, including the obligation to pay union dues and initiation fees. In *NLRB v. General Motors*,<sup>8</sup> however, the Supreme Court interpreted the above statutory provisions and held that employees need not become formal union "members" in order to retain their employment so long as they pay the equivalent of union dues and fees. The Court stated:

It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership," as a condition of employment, is whittled down to its financial core.<sup>9</sup>

Thus, the Respondents' employees were not obligated to become or remain members of the Union in order to obtain the benefits of the contract.<sup>10</sup> Indeed, the contract would be illegal if it were interpreted in the manner sought by the Respondents.<sup>11</sup> Accordingly, the Respondents' Affirmative Defense One is completely without merit and is rejected. Consequently, the General Counsel's Motion for Partial Summary Judgment on specification paragraph 2(c) is granted.

The Respondents, however, have specifically stated the basis for their disagreement with the accuracy of the figures in appendix A of the specification. They have also supplemented appendix 1 of their answer with the calculations provided in exhibit 2 of their memorandum in opposition to the motion, which sets forth their position in detail and furnishes the appropriate supporting figures. We find that, by so doing, the Respondents have met the requirement for a hearing on the allegations in

<sup>5</sup> The General Counsel asserts in the specification, and the Respondents do not deny, that all computations are based on certain payroll information obtained from the Union and the employees, and that, "[a]lthough requested," the Respondents have only submitted payroll records up to April 4, 1998. The General Counsel further states in the specification that if additional payroll records as well as other documentation and information submitted by the parties disclose that the backpay calculations should be updated or are inappropriate, the General Counsel may amend the specification.

<sup>6</sup> Art. I of the contract states in pertinent part that:

It is further agreed that as a condition of employment all Employees at operations covered by this Agreement shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law.

<sup>7</sup> The Respondents cite no precedent in support of their Affirmative Defense One.

<sup>8</sup> 373 U.S. 734 (1963).

<sup>9</sup> *Id.* at 742.

<sup>10</sup> Indeed, art. XX, HEALTH AND RETIREMENT BENEFITS, sec. (d), Contributions by Employers, of the contract imposes no such Union-membership qualification on employees. Rather, it states in pertinent part that

[E]ach signatory Employer . . . shall contribute to the Trusts . . . the amounts specified below based on cents per hours worked by *each of the Employer's Employees who perform classified work under this Agreement*. [Emphasis added.]

<sup>11</sup> See *Stage Employees LATSE (Hughes-Avicom International)*, 322 NLRB 1064, 1065 (1997) (union violated the Act by entering into and maintaining a contractual provision requiring employees to become union members in order to qualify for employer contributions to the pension fund).

paragraph 2(d) of the specification.<sup>12</sup> Accordingly, the Motion for Summary Judgment on paragraph 2(d) and appendix A of the specification is denied.

### *B. Recall of Unit Employees*

#### 1. Positions of the parties

Paragraph 4(i) of the specification alleges (1) that calendar quarter gross backpay, benefits and funds payments for those employees who were not properly recalled by the Respondents<sup>13</sup> are based on the hours of work of employees employed by the Respondents in the same job classification during the backpay period, and the level of wages, benefits and funds payments provided in the collective-bargaining agreement, and (2) that the specific determinations of hours of work, gross backpay,<sup>14</sup> benefits and funds payments are set forth in appendix C to the specification. In their answer, the Respondents deny that any amounts of backpay are due and owing because they deny that they had any obligation to recall and/or that they failed to recall the individuals identified in specification appendix C.<sup>15</sup> Additionally, consistent with their denials in other parts of their answer (discussed elsewhere in this supplemental decision), the Respondents deny that they owe the individuals listed in specification appendix C for benefits such as Pension Trust contributions and holiday and bonus pay. Alternatively, the Respondents assert that if amounts are due and owing, the Respondents are without sufficient information to make alternative calculations, and, “therefore, deny” that they are liable for the amounts listed in specification appendix C.<sup>16</sup>

The General Counsel argues that the Respondents’ answer to paragraph 4(i) and appendix C of the specifica-

tion fails to comport with the requirements of Section 102.56(b), because the answer constitutes only a general denial of the gross backpay computations. The General Counsel further argues that the Respondents’ answer that they did not fail to recall the named employees and/or were not obligated to recall them is not a legitimate basis for failing to dispute the accuracy of the gross backpay, benefits and funds payments computations or the formula on which those computations are based. Thus, the General Counsel argues that the Respondents have no valid basis for failing adequately to answer paragraph 4(i) and appendix C of the specification, and that the Respondents’ general denial is insufficient.

The Respondents expressly do not dispute the basic premise used to calculate gross backpay, i.e., the estimated hours worked. They do, however, renew their denial that they owe the individuals listed in specification appendix C for benefits such as Pension Trust contributions and holiday and bonus pay, and refer to their arguments on the merits of these denials contained elsewhere in their memorandum in opposition to the motion (and addressed elsewhere in this supplemental decision).

#### 2. Analysis and conclusions

It is well settled that a respondent’s general denial of the backpay computations contained in a compliance specification will be deemed insufficient if the answer fails to specify the basis for the disagreement with the backpay computations contained in the specification, fails to offer any alternative formula for computing backpay, fails to furnish appropriate supporting figures for amounts owed, or fails adequately to explain any failure to do so.<sup>17</sup> As the General Counsel notes, although the Respondents generally deny the computations and formula set forth in the specification, their answer fails to offer any alternative formula or supporting figures.<sup>18</sup>

Section 102.56(b), *supra*, states in pertinent part that “[a]s to all matters within the knowledge of the respondent, *including but not limited to the various factors entering into the computation of gross backpay*, a general denial shall not suffice” (emphasis added). We find that the gross backpay, bonus and holiday pay amounts specified in specification appendix C for the five individuals in question clearly enter into the computation of their total gross backpay (i.e., before any adjustment for interim earnings), and are thus matters within the Respondents’ knowledge. We also find that the Pension Trust contribution amounts in specification appendix C are within the Respondents’ knowledge. Indeed, the Re-

<sup>12</sup> It is well settled that a respondent may properly cure defects in its answer before a hearing either by an amended answer or a response to a Notice to Show Cause. *Ellis Electric*, 321 NLRB 1205, 1206 (1996), and cases cited therein. Here, the Respondents’ memorandum in opposition to the motion is in response to the Board’s Notice to Show Cause. Therefore, in considering the sufficiency of the Respondents’ denials, we examined not only their answer, but also their memorandum in opposition to the motion.

<sup>13</sup> Specifically, Chester Murphy, Afton Willis, Anthony Demarco, Opie Hanshaw, and Kenneth Davis.

<sup>14</sup> Including bonus and holiday pay.

<sup>15</sup> Specifically, the Respondents assert elsewhere in their answer to the specification that they were not obligated to recall Murphy, Willis, or Demarco because those individuals did not complete required paperwork and/or were not available for work at the time of recall; and that they were not obligated to recall Hanshaw or Davis because they were properly recalled. The General Counsel, however, is not seeking, and we do not grant, summary judgment on the issue of whether the Respondents were obligated to recall these individuals. Thus, the Respondents’ arguments as to those aspects of the specification will not be further addressed in this supplemental decision.

<sup>16</sup> Specifically, the Respondents assert that they do not have specific information about the individuals’ interim earnings or medical bills submitted. The General Counsel, however, is not seeking, and we do not grant, summary judgment as to interim earnings or medical bills. Thus, the Respondents’ arguments as to those aspects of the specification will not be further addressed in this supplemental decision.

<sup>17</sup> See, e.g., *Best Roofing Co.*, 304 NLRB 727 (1991); *Robincrest Landscaping & Construction*, 303 NLRB 377 (1991).

<sup>18</sup> The General Counsel asserts that the Respondents would “certainly” have access to the payroll records that they provided to the General Counsel for him to compute the gross backpay amounts, benefits and Pension Trust payments due the employees.

spondents have expressly accepted the basic premise used to calculate backpay, i.e., the estimated hours worked, and estimated hours worked is in turn one of the bases (together with an alleged 71 cents per hour rate of contribution) for the General Counsel's computation of the alleged Pension Trust contributions owed on behalf of the five individuals in question. Thus, we find that the Respondents' general denial that they are liable for the amounts of gross backpay, bonus and holiday pay, and Pension Trust contributions for these five individuals has not satisfied the requirements of Section 102.56(b) for specificity and detail in their denial of matters within their knowledge. Consequently, the Respondents have not met the requirements for a hearing on the allegations in paragraph 4(i) of the specification. Accordingly, the Motion for Summary Judgment on specification paragraph 4(i) and the gross backpay, bonus and holiday pay, and Pension Trust contributions for the five individuals in specification appendix C is granted.

### *C. Overtime Pay*

#### 1. Positions of the parties

Paragraph 5(a) of the specification alleges that the backpay period for the Respondents' failure to pay unit employees overtime wages in accordance with the contract is from January 26, 1993, until January 1, 1995, when the Respondents gave full effect to the relevant overtime provisions of the contract. Paragraph 5(c) alleges the formula for computation of overtime and also alleges that the specific calculations of the amounts of the overtime payments owed to unit employees are set forth in appendix D of the specification. In their answer, the Respondents deny that they owe any backpay to unit employees for overtime payments, but they admit the remaining allegations in paragraph 5(a) (i.e., the backpay period). Alternatively, the Respondents assert that if such amounts are owed, the Respondents are not liable for the amounts set forth in appendix D of the specification, but rather are liable for the amounts set forth in appendix 2 of their answer.<sup>19</sup>

The General Counsel argues that the Respondents' answer fails to articulate any reason in support of their general denial that they owe any backpay to unit employees for overtime payments. The General Counsel argues further that the Respondents' alternative computation for overtime amounts due, in appendix 2 of their answer, merely contains an overall dollar amount for the overtime pay due each employee, but fails to provide the applicable premises or supporting figures for computing those amounts.

In opposition to the motion, the Respondents first raise their Affirmative Defense Two, i.e., that they are entitled

to offset (1) any amounts alleged as owing in the specification with (2) the total amount paid to all employees in excess of what the Respondents would have been required to pay them under the contract. The Respondents acknowledge that their Affirmative Defense Two is the basis for their denial of any backpay liability for overtime. More specifically, the Respondents acknowledge (as alleged in app. D of the specification) that the hourly wage rates for employees under the contract were \$16.615 or \$15.843, depending on an employee's job classification. The Respondents assert, however, that from February 1993 (i.e., following their unlawful abrogation of the contract in January 1993) through December 31, 1994, they paid their employees \$17 per hour, regardless of job classification. Thus, they argue that basic principles of equity and fairness dictate that they are entitled to offset any amounts owed because of any underpayments in contractual benefits (e.g., here, the failure to pay contractual overtime wages) with the total amount of their overpayment of wages.<sup>20</sup> The Respondents contend that if they are not permitted such an offset, the employees will receive a windfall rather than simply being made whole.

The General Counsel argues that the Respondents' Affirmative Defense Two should be rejected. More specifically, the General Counsel argues that there is no contention or evidence that the Respondents and the Union ever agreed to or even bargained about any type of procedure whereby the higher hourly wage rates unilaterally implemented and paid by the Respondents could be used as an offset against the benefits and funds payments the Respondents owed as a result of their unlawful abrogation of the contract. The General Counsel further argues that the higher wage rates cannot properly be considered as a type of "interim earnings" which can be deducted from gross backpay. Finally, the General Counsel argues that there is no Board precedent in support of this affirmative defense.

The Respondents argue in the alternative, if it is ultimately determined that they are liable for such overtime payments, that the General Counsel miscalculated the amount of the payments allegedly owed in specification appendix D, and that the Respondents, in appendix 2 to their answer to the specification, offered specific, alternative calculations to those alleged by the General Counsel as to amounts of overtime payments owed. In support of their alternative position, the Respondents have supplemented the amounts set forth in appendix 2 to their answer with assertedly more specific calculations contained in exhibit 3 to their memorandum in opposition to the motion. The Respondents state that the basis for their

<sup>19</sup> In its answer, however, the Respondents do admit that the contract provides that employees will be paid at the rate of one and one-half times their regular rate for hours worked beyond 8 hours per day.

<sup>20</sup> In app. 4 to their answer to the specification, the Respondents allege such specific "overpayments" to 34 named employees during 1993-1994, in the total amount of \$65,878.60.

figures is the same payroll information they provided to the Region.

## 2. Analysis and conclusions

We agree with the General Counsel that the Respondents' Affirmative Defense Two should be rejected. Assuming *arguendo* the accuracy of the Respondents' claim that they paid unit employees \$17 per hour from February 1993 through December 1994,<sup>21</sup> we find nevertheless, for the reasons discussed below, that the Respondents are not entitled to offset their overpayment of straight hourly wages against their liability for overtime.

Although the Respondents have not cited any precedent in support of Affirmative Defense Two, the relevant principles are well established. In determining whether a respondent should be allowed a credit or setoff against backpay claims, the Board examines the nature and purpose of the payments in question. The basic rule is that a respondent is entitled to a setoff only if the additional compensation paid the employees is equivalent to the element of backpay claimed in the specification. See *K & H Specialties Co.*, 163 NLRB 644, 648–649 (1967), *enfd.* 407 F.2d 820 (6th Cir. 1969), followed in *Virginia Sportswear*, 234 NLRB 315 (1978), and *R & H Coal Co.*, 306 NLRB 701 (1992), *enfd.* 992 F.2d 46 (4th Cir. 1993).

For example, in the leading case of *K & H Specialties*, *supra*, the backpay specification claimed wages due employees as a result of the employer's unlawful refusal to execute a collective-bargaining agreement. The respondent argued that three types of additional compensation paid employees should be treated as setoffs: "regular monthly bonuses"; "intermittent bonuses"; and wage payments in excess of the contract rate. The Board examined the nature and purpose of each of those three payments in order to determine whether they should be treated as the equivalent of the wages claimed in the backpay specification.

First, with respect to the "regular monthly bonuses," the Board found that they were based on the performance of normally assigned duties; an employee did not have to do anything extra to earn this bonus. Therefore, the Board concluded that these bonuses should be treated as regular compensation and should be set off against the wages due under the backpay specification. 163 NLRB at 648.

Second, with respect to the "intermittent bonuses," the Board found that they were given on an irregular basis as "unexpected, gratuitous rewards either for extraordinary efforts" or "for the performance of services beyond the range of [the employee's] primary duties." *Id.* at 649. Therefore, the Board concluded that these bonuses should not be treated as regular compensation and should

not be set off against the wages due under the backpay specification. *Id.*

Finally, the Board held that the payment of *higher* than contract wages for the performance of normally assigned duties should be treated as regular compensation and should be set off against the wages due under the backpay specification. *Id.*

In sum, the respondent was permitted to offset its wage liability with payments that were the equivalent of wages (the "regular monthly bonuses" and the higher-than-contract wages), but was not granted an offset with respect to payments that differed in nature and purpose (the intermittent bonuses). Accord: *Virginia Sportswear*, *supra* at 316 (bonuses that were discretionary and awarded on the basis of superior performance could not be used as offsets against the employer's backpay liability for contractual overtime pay, vacation pay, holiday pay, and bereavement pay); *R & H Coal*, *supra* at 702–703 (bonuses paid to employees to reward them for extraordinary efforts to increase production could not be used as offsets against the employer's backpay liability for contractual wages).

Applying these principles here, we find that premium payments for overtime work<sup>22</sup> are fundamentally different in kind and purpose from straight wages for regular hourly work. Overtime payments are intended to compensate employees for the additional difficulties, inconvenience, and expenses that overtime work entails. Thus, working beyond the standard 8 hours in a given day necessarily requires an extra measure of physical and mental effort. If required by the employer on short notice, overtime work will almost certainly require the employee to abandon or at least change his or her plans for the rest of that day. Overtime work may also require the employee to incur additional expenses for transportation in lieu of carpool, purchasing meals, and arranging for additional childcare. Furthermore, to permit the Respondents to use their unlawful, unilateral overpayment of straight hourly wages to reduce the amount of their remedial liability for their unlawful, unilateral elimination of premium payments for overtime work would be to diminish the value of the contractual benefit that was negotiated by the Union, agreed to by the Respondents, and earned by the employees.<sup>23</sup>

<sup>22</sup> Here, the collective-bargaining agreement provides that employees will be paid at one and one-half times the regular hourly rate for hours worked beyond 8 hours in a day.

<sup>23</sup> As indicated above, the regular hourly wages under the contract are either \$16.615 or \$15.843, depending on job classification. Following the Respondents' unlawful abrogation of the contract, employees were paid \$17 per hour for both regular time and overtime work—an increase of either 2.3 or 7.3 percent over contractual regular hourly rates, depending on job classification. But the *contractual overtime* rates are one and one-half times the regular hourly rates, and thus provide for a premium of 50 percent over contractual regular hourly rates. In order to remedy the Respondents' unfair labor practice, we believe the employees are entitled to the full measure of the overtime benefit

<sup>21</sup> The General Counsel does not challenge the accuracy of this claim at this stage of the proceeding.

For all these reasons, we conclude that the Respondents are not entitled to a set off because the additional compensation in issue (overpayment of straight hourly wages) is not equivalent to the element of backpay claimed in the specification (premium pay for overtime work). Therefore, consistent with the precedent discussed above, we reject the Respondents' Affirmative Defense Two. The Respondents acknowledge in their memorandum in opposition to the motion that Affirmative Defense Two is the basis for the Respondents' denial that they owed any backpay for overtime. Having rejected that defense, we in turn grant the General Counsel's Motion for Partial Summary Judgment on specification paragraph 5(a).

We find, however, that by specifically stating the basis for their disagreement with the accuracy of the figures in appendix D of the specification and by supplementing appendix 2 of their answer with the calculations provided in exhibit 3 of their memorandum in opposition to the motion, which sets forth their position in detail and furnishes the appropriate supporting figures, the Respondents have met the requirement for a hearing on the allegations in paragraph 5(c) and appendix D of the specification. Accordingly, the Motion for Summary Judgment on paragraph 5(c) and appendix D of the specification is denied.

#### *D. Holiday Pay*

##### 1. Positions of the parties

Paragraph 6 of the specification, and its subparagraphs (a) through (d), allege in essence that: the backpay period for the Respondents' failure to pay unit employees holiday pay is from January 26, 1993, until January 1, 1995, when the Respondents gave full effect to the relevant holiday provisions of the contract; the contractual rate for holiday pay;<sup>24</sup> the specific holidays set forth in the contract for which employees are eligible for holiday pay; and the specific calculations of the amounts of holiday pay owed to unit employees set forth in appendix E of the specification. In their answer, the Respondents deny that any amounts are due and owing for holiday pay because the contractual provisions relating to holiday pay apply only to holidays specifically designated in article XII (Holidays) of the contract, which in turn designates holidays only for specific years and dates and does not designate holidays after February 1, 1993.<sup>25</sup> Similarly, in

which their collective-bargaining representative obtained for them (one and one-half times the contractual regular hourly rate), reduced only by the amount they actually received for performing overtime work (\$17 per hour).

<sup>24</sup> Triple regular straight time wage rates for employees who work on a paid holiday; regular straight time wage rates for employees who do not work on a paid holiday.

<sup>25</sup> Thus, in art. XII—HOLIDAYS, sec. (a) Holidays Observed, each of the 55 total holidays (11 each year, including employee birthdays) occurring within the term of the February 1, 1988—February 1, 1993 contract is (except for employee birthdays) specifically identified by

Affirmative Defense Four, the Respondents claim that "[c]ertain terms of the 1988 Wage Agreement did not survive that contract's February 1, 1993 expiration." Alternatively, the Respondents assert that if amounts for holiday pay are owed, the Respondents are not liable for the amounts set forth in appendix E of the specification, but rather are liable for the amounts set forth in appendix 3 of their answer, which are assertedly based on whether the individuals listed in that appendix actually worked on the holidays identified.

The General Counsel argues that the Respondents' position, in sum, is that they do not owe backpay for holiday pay because the contractual holiday provisions did not survive the February 1, 1993 expiration of the contract. The General Counsel argues that such a position is contrary to well-established Board precedent which holds that most terms and conditions of employment established in a collective-bargaining agreement survive the expiration of the agreement and cannot be changed by an employer without first obtaining the agreement of, or bargaining to impasse with, the union. The General Counsel further argues that there is no evidence or contention in this case that either such requirement has been met. The General Counsel also argues that the inclusion in the contract of the specific calendar dates for each of the holidays encompassed within the 5-year period of the contract is merely descriptive of the dates when each of these holidays were to occur, but cannot reasonably be construed as overriding the Respondents' legal obligation to continue this term and condition of employment in effect following expiration of the contract.

The General Counsel additionally argues that appendix 3 of the Respondents' answer, setting forth the Respondents' alternative claims as to the specific amounts owed to particular employees for holiday pay, if any, provides only an overall total amount owed to each employee, but does not provide any supporting figures or applicable premises for deriving such amounts, and that Respondents' appendix 3 therefore fails to comport with the requirement of specificity under Section 102.56(b) of the Board's Rules and Regulations.

In their opposition to the motion, the Respondents renew their argument that the holiday provisions in the contract did not survive the expiration of the contract because the holidays listed in the contract were specifically designated only for specific days and years and no holidays after February 1, 1993, were so designated. Quoting the contractual holiday provisions which state

name and precise calendar date for each of the 5 years of the contract, e.g., Labor Day, September 5, 1988; Thanksgiving Day, November 23, 1989; Christmas Day, December 25, 1990; etc. The final companywide holiday specified in the contract is New Year's Day, January 1, 1993. But because an employee is entitled to a paid holiday on his birthday, the last possible paid holiday under the contract would be February 1, 1993 (the final day of the contract), for employees whose birthday fell on that day.

that “[e]mployees who work on the *foregoing* holidays . . . will be paid triple time or triple rates for all time worked” (emphasis added by the Respondents), the Respondents argue that “[t]hus, the contract does not contain any provision for holiday pay on dates other than those designated in the express terms of Article XII [Holidays].”

In support of their alternative position that the specification has miscalculated the amounts owed, the Respondents have supplemented the amounts set forth in appendix 3 to their answer with assertedly more specific calculations contained in exhibit 8 to their memorandum in opposition to the motion.

## 2. Analysis and conclusions

It is a well-established legal principle that the holiday provisions in a collective-bargaining agreement survive the expiration of that agreement, and continue in effect as terms and conditions of employment which cannot be changed absent agreement or impasse.<sup>26</sup> We agree with the General Counsel that the inclusion in the contract of the specific calendar dates for each of the holidays encompassed within the 5-year period of the contract is merely descriptive of the dates when each of these holidays were to occur, and cannot reasonably be construed as an agreement between the parties relieving the Respondents’ of their obligation under the Act to continue this term and condition of employment in effect following expiration of the contract.<sup>27</sup> Consequently, we reject the Respondents’ Affirmative Defense Four (i.e., that certain terms of the contract did not survive the contract’s February 1, 1993 expiration) as it pertains to this allegation in the specification. Therefore, we grant the General Counsel’s Motion for Summary Judgment on paragraph 6 of the specification.

We also grant the Motion for Summary Judgment on the allegations in page 1 of appendix E of the specification, setting forth the alleged amounts of holiday backpay owed to employees for 1993. Appendix 3 of the Respondents’ answer to the specification asserts only totals of holiday backpay owed for each employee. Neither appendix 3 nor exhibit 8 of the Respondents’ memorandum in support of their opposition to the motion provide any supporting figures or applicable premises for deriving such holiday backpay amounts for 1993, and thus they fail to comport with the requirements of Sec-

tion 102.56(b) of the Board’s Rules and Regulations for specificity and detail in their denial of the accuracy of the figures set forth in page 1 of appendix E of the specification. Accordingly, the Motion for Summary Judgment on page 1 of appendix E of the specification is granted.

With respect to page 2 of appendix E of the specification, setting forth the alleged amounts of holiday pay owed to employees for 1994, the Respondents have supplemented appendix 3 of their answer with exhibit 8 of their memorandum in opposition to the motion. This exhibit provides specific, alternative figures for 1994 holiday pay, which are assertedly based on whether the individuals listed in the appendix actually worked on the holidays identified. Therefore, we find that by supplementing appendix 3 of their answer with the calculations for 1994 holiday pay set forth in exhibit 8 of their memorandum in opposition to the motion, the Respondents have met the requirement for a hearing on the allegations in page 2 of appendix E of the specification. Accordingly, the Motion for Summary Judgment on page 2 of appendix E of the specification is denied.

## E. Graduated Vacation

Paragraph 7 of the specification alleges in substance that the contract provides that employees will be given additional paid vacation days each year depending on their length of continuous employment with the Respondents, and that employees may be paid in lieu of taking graduated vacation; that the backpay period for the Respondents’ failure to provide unit employees with graduated vacation in accordance with the contract is from January 1, 1995, until such time as the Respondents give full effect to the relevant provisions of the contract; and that the specific calculations of the amounts of total graduated vacation pay owed to employees is set forth in appendix F of the specification. In their answer, the Respondents deny that they owe any graduated vacation pay on the grounds that article XIV, GRADUATED VACATION, of the contract does not provide for graduated vacation after the February 1, 1993 expiration of the contract. However, in their memorandum in opposition to the subsequent Motion for Partial Summary Judgment, the Respondents concede that they are liable for the amounts set forth in specification appendix F if their Affirmative Defenses One and Two are found to be without merit. Having found all of the Respondents’ affirmative defenses to be without merit, and in light of the Respondents’ concession, we therefore grant the General Counsel’s Motion for Summary Judgment on paragraph 7 and appendix F of the specification.

## F. Bonuses

### 1. Positions of the parties

Paragraph 8 of the specification alleges in substance that the contract provides that employers may establish

<sup>26</sup> See *Litton Financial Printing v. NLRB*, 501 U.S. 190, 206–207 (1991), citing *NLRB v. Katz*, 369 U.S. 736 (1962). *Carlow’s Ltd.*, 315 NLRB 27 (1994); *Chas. P. Young Houston*, 299 NLRB 958, 964–965 (1990); *White Oak Coal Co.*, 295 NLRB 567 (1989); *Hi-Grade Materials Co.*, 239 NLRB 947, 956 (1978).

<sup>27</sup> Accordingly, we find that the arbitration awards submitted by the Respondents, which interpret virtually identical contract holiday language in predecessor National Bituminous Coal Wage Agreements, are wholly irrelevant to the instant issue of whether, under the National Labor Relations Act, the obligation to pay holiday pay continues in effect after contract expiration.

bonus plans for employees;<sup>28</sup> that about April 1994, the Respondents established a bonus plan that provides that employees receive \$500 each during any month in which 100,000 or more tons of coal are produced; that the backpay period for the Respondents' failure to provide "working unit employees" bonuses is from January 1, 1995, until such time as the Respondents give full effect to the relevant provisions of the contract; and that the specific calculations of the amounts owed for the Respondents' failure to pay bonuses in accordance with the contract are set forth in appendix G of the specification.

The Respondents deny that a bonus system was ever established in accordance with article XXII, section(s), of the contract, and they specifically deny that about April 1994, they established a bonus plan that provides that employees receive \$500 each during any month in which 100,000 or more tons of coal are produced. Alternatively, the Respondents assert that they modified and terminated any bonus system that may have been in place in accordance with article XXII, section(s), of the contract. More specifically, they assert that, "at one time," they paid their employees a \$500 bonus during any month in which production exceeded 100,000 tons of raw coal, and that they later modified that bonus to be paid during any month in which production exceeded 50,000 tons of clean coal, but that they terminated this bonus plan.<sup>29</sup> The Respondents have not offered alternative calculations to those contained in appendix G of the specification.

The General Counsel contends that in the event that the Board should conclude that there is a genuine issue of material fact as to whether the Respondents' were obligated to pay bonuses during the relevant backpay period, the Respondents should nevertheless be precluded from disputing the General Counsel's calculations of bonus amounts due and owing, because the Respondents' have failed to articulate any reason for not contesting these calculations, despite the fact that the Respondents' coal tonnage records, which the General Counsel used for his calculations, are assertedly in the Respondents' possession. Accordingly, the General Counsel requests that the Board grant his Motion for Partial Summary Judgment with respect to the backpay amounts due, as set forth in appendix G of the specification. The Respondents in turn concede that, if they are found to be liable for bonus

pay at all, then they are liable for the amounts set forth in specification appendix G.

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<sup>28</sup> Par. 8 specifies:

Art. XXII, MISCELLANEOUS, sec. (s), Bonus Plans, provides in pertinent part that before any bonus plan can be installed, it must be submitted to a vote by the employees to be covered by the plan. The employer may establish the plan if a majority of the employees *voting* approve the plan.

<sup>29</sup> Under art. XXII, sec. (s)(1)(F), of the contract, the Respondents could unilaterally terminate a bonus plan, subject to the requirement of "first giving notice to the members of the bargaining unit at the mine thirty days prior to the date of termination."

## 2. Analysis and conclusions

We find that the Respondents have raised material issues of fact in regard to the allegations in paragraph 8 of the specification as to whether they are liable for any bonus payments. Thus, they have met the requirement for a hearing on the allegations in paragraph 8, and the Motion for Summary Judgment on that paragraph is denied. However, in light of the Respondents' concession, there is no material issue of fact with regard to the General Counsel's calculations of bonus payments due in specification appendix G. Thus, the General Counsel's Motion for Summary Judgment on appendix G is granted. Consequently, we find that if it is determined in further proceedings that the Respondents are liable for bonus pay, then they are liable for the amounts set forth in appendix G.<sup>30</sup>

## ORDER

It is ordered that the General Counsel's Motion for Partial Summary Judgment is granted as to the allegations contained in paragraphs 2(c), 4(i), 5(a), 6 and 7, appendixes F and G, page 1 of appendix E, and the gross backpay, bonus and holiday pay, and Pension Trust contributions for the five individuals in specification appendix C of the compliance specification.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment is denied as to paragraphs 2(d), 5(c), and 8, and appendixes A, D, and page 2 of appendix E.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 9 for the purposes of issuing a notice of hearing and scheduling a hearing before an administrative law judge, for the taking of evidence concerning factual issues properly raised by the Respondents' answer to the compliance specification.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

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<sup>30</sup> In regard to bonus pay, the General Counsel asserts in the specification, and the Respondents do not deny, that, "[a]lthough requested," the Respondents have only submitted production tonnage records up to September 1996, and that if additional tonnage records disclose that the backpay calculations should be updated or are inappropriate, this specification may be amended.